Attachment 7 - Applicant's Clause 4.6

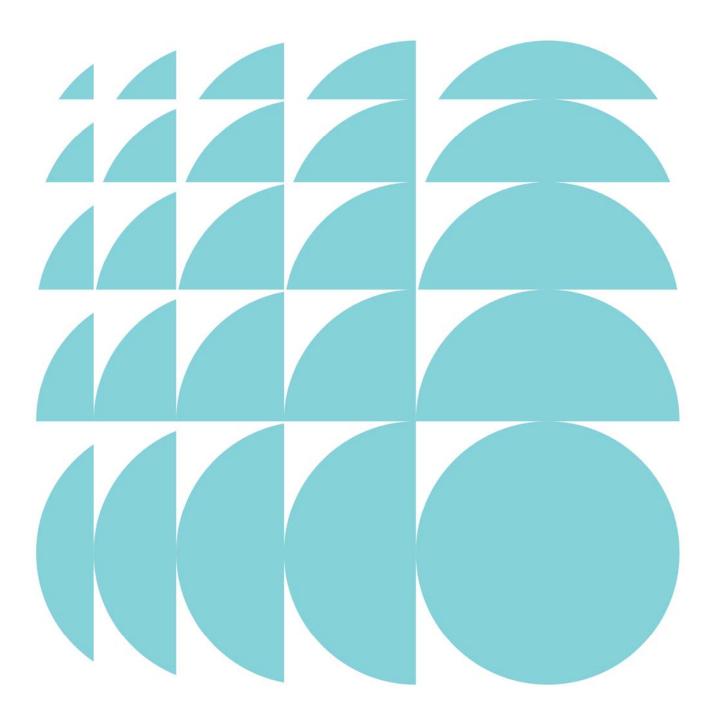
E T H O S U R B A N

Request to Vary a Development Standard Building Height

34-42 Tallawong Road, Rouse Hill Concept Plan

Submitted to Blacktown City Council On behalf of CDMA Australia Pty Ltd

31 July 2018 | 17262



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Attachment A – updated Solar Study (July 2018) prepared by Kannfinch

1.1 Introduction

This request to vary a development standard has been prepared under Clause 4.6 of Appendix 12 of the Growth Centres SEPP, and is submitted to Council in support of a Concept Proposal for a residential development. The proposed variation relates to the development standard specified under Clause 4.3 of the SEPP, being the maximum height of buildings.

Clause 4.6 allows the consent authority to grant consent for a development even though the development contravenes a development standard imposed by the controls. The clause aims to apply an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

Clause 4.6 requires that a consent authority be satisfied of the following matters before granting consent to a development that contravenes a development standard:

- That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- That the applicant has adequately demonstrated that there are sufficient environmental planning controls to justify contravening the development standard; and
- That the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone is proposed to be carried out.

The consent authority's satisfaction as to those matters must be informed by the objective of providing flexibility in the application of the relevant control to achieve better outcomes for and from the development in question.

The Land and Environment Court has established questions to be addressed in variations to developments standards lodged under State Environmental Planning Policy 1 – Development Standards (SEPP 1) through the judgment of Justice Lloyd, in *Winten Property Group Ltd v North Sydney Council* [2001] 130 LGERA 79 at 89. The test was later rephrased by Chief Justice Preston, in the decision of *Wehbe v Pittwater Council* [2007] NSW LEC 827 (Wehbe).

An additional principle was established in the recent decision by Commissioner Pearson in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 (Four2Five) which was upheld by Pain J on appeal.

These tests and considerations can also be applied to the assessment of variations under clause 4.6 of the Growth Centres SEPP. Accordingly, this Clause 4.6 variation request is set out using the relevant principles established by the Court.

1.2 Development Standard to be Varied

The development standard that is sought to be varied as part of this application is Clause 4.3 of Appendix 12 of the Growth Centres SEPP, relating to the maximum height of buildings. Under this provision, the site is afforded a maximum building height of 16 metres. An extract of the Height of Buildings Map to which this clause applies is shown in **Figure 1**, and Clause 4.3 has been reproduced in its entirety below.

4.3 Height of Buildings

- (1) The objectives of this clause are as follows:
 - (a) to establish the maximum height of buildings,
 - (b) to minimise visual impact and protect the amenity of adjoining development and land in terms of solar access to buildings and open space,
 - (c) to facilitate higher density development in and around commercial centres and major transport routes.
- (2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.

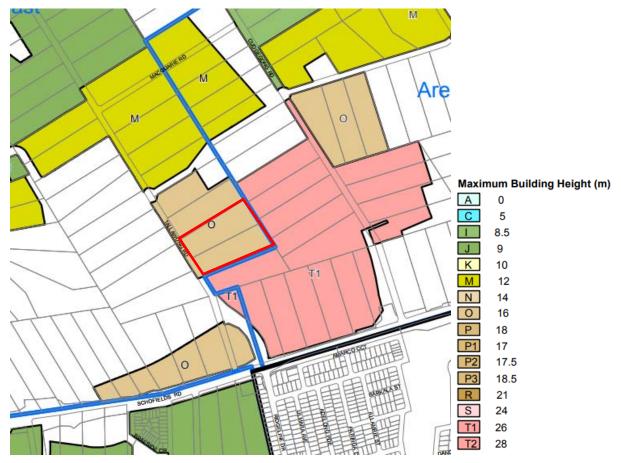


Figure 1- Extract of the height of buildings map (site outlined in red)

Source: SEPP (Sydney Region Growth Centres) Appendix 12

1.2.1 Is the Planning Control a Development Standard?

'Development Standards' are defined under Section 4(1) of the EP&A Act as follows:

"development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of: ...

(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,..."

The maximum building height control under clause 4.3 of the LEP is clearly and unambiguously a development standard.

1.2.2 Nature of Variation

As described in the Statement of Environmental Effects (SEE) and illustrated on the indicative concept plans prepared by Kannfinch (submitted separately), the Concept Proposal will exceed the maximum building height of 16 metres. The proposed variations to the maximum height limit are proposed to generally accommodate parapet, roof slab and inboard plant and lift overruns. The proposed exceedances range from 35cm (Building A) to 4.67m (Building G) from the existing ground level; and from 31cm (Building G) to 3.7m (Building E) from the finished ground level. It is well established in case law that the extent of the numerical variation does not form part of the test required to be exercised under clause 4.6. Recent decisions in respect of *Micaul Holdings P/L v Randwick City Council* (55% exceedance of height and 20% exceedance of FSR) and *Moskorich v Waverley Council* (65% exceedance of FSR) reinforce this position. **Figure 2** shows the extent of the proposed variations to the proposed height limit from the existing ground level.

The proposed variations to the maximum height limit is a result of the following site-specific reasons:

- Topographical changes in existing ground level; and
- Changes to the finished ground levels to respond to the road levels set to accommodate Council's preferred road grades.

The existing ground levels vary significantly across the site between 52m to 65m AHD, generally falling from south east to north west and towards Tallawong Road. The site is also steep in parts (refer to the Site Survey submitted separately at **Appendix C**). In addition, Council have instructed the applicant to cut and fill land where necessary to achieve appropriate road grades to accommodate stormwater requirements. This has resulted in a requirement to raise the existing ground by up to 1.6m in parts to achieve acceptable road grades. Therefore, the finished site levels have been adjusted to allow the ground floor of the building envelopes to generally relate to the proposed roads levels in order to provide an appropriate relationship between the future built form and the public domain. In this regard, all street elevations are five storeys which is commensurate with Council's expectations for built form within the 16m height limit.

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2000 DISTANCE ABOVE EXISTING HEIGHT PLANE

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Figure 2 - The 16m height plane calculated from the existing ground level



2000 DISTANCE ABOVE NEW HEIGHT PLANE

Figure 3 – The 16m height plane calculated from the finished ground level

1.3 Justification for Contravention of the Development Standard

1.3.1 Site Context

Site context is a key consideration when determining the appropriateness and necessity of a development standard. The proposed development is located in the Riverstone East Precinct, and is proximate to the future Cudgegong Road Metro Station that will from 2019 provide high capacity public transport within 2 -3 minutes walking distance from the Site. The Site's location within a potential future public transport corridor extending from Cudgegong Road to the Marsden Park Strategic Centre, highlights the opportunity for more urban and mixed-use development.

The proposed building envelopes have been designed in response to the transitional nature of the area and to address the Site's location adjoining the Cudgegong Road Centre, which will provide essential services and facilities. The subject site is located immediately adjacent to the Area 20 Precinct, and sites in that precinct that are similarly close to the town centre and metro station have a maximum height limit of 26 metres. In this regard, the existing height limits that apply to the Site do not reflect the height limits applicable to neighbouring Site's with the same characteristics; or the vision for the area and the Site's strategic location.

1.3.2 Public Interest

Clause 4.6(4)(a)(ii) of the SEPP (Appendix 12) requires that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the standard and the objectives for development within the zone in which the development is proposed to be carried out.

The proposed development has been assessed against the objectives for the R3 Medium Density Residential zone and the height of buildings development standard below. Despite the proposed variation to the maximum building height development standard, the proposal is considered in the public interest as it nevertheless, will satisfy the objectives of the zone and the objectives of the development standard.

Consistency with the objectives of the R3 Medium Density Residential zone

The proposal is consistent with the objectives of the R3 Medium Density Residential zone as outlined below.

To provide for the housing needs of the community within a medium density residential environment.

The Concept Proposal will facilitate a built form that can comply with the relevant medium density development controls established in the BCC Growth Centres Precincts DCP. The proposed development fundamentally seeks to respond to the DCP objectives by providing a range of new residential apartments that can meet the metropolitan housing needs of the existing and future community - within walking distance of the future Cudgegong Road Metro Station.

To provide a variety of housing types within a medium density residential environment.

The Concept Proposal will facilitate the future development of a range of 1, 2 and 3 bedroom dwellings in various configurations over various levels. This will provide a variety of housing types to contribute to housing choice and mix and address market demand in the area. The Concept Proposal will contribute to housing diversity and increase housing choice within the area by providing additional housing in an urban area with good access to the future metro station and Town Centre.

To enable other land uses that provide facilities or services to meet the day to day needs of residents.

The Concept Proposal seeks approval for one neighbourhood shop to form part of the future detailed development of the site. The neighbourhood shop will provide retail facilities to meet the day-to-day needs of the future residents prior to the construction of the town centre retail precinct, and will continue to provide convenience retail into the future, following the establishment of the town centre.

To support the well-being of the community by enabling educational, recreational, community, religious and other activities where compatible with the amenity of a medium density residential environment.

The Concept Proposal will not hinder the provision of the activities listed above. Further, it will support the well-being of the community by facilitating the provision of high-quality homes that will integrate with the adjoining centre, which is earmarked to provide a range of non-residential facilities. In addition, the proposal includes communal open space areas on site that significantly exceed Council spatial requirements; enhanced through-site links which will substantially improve pedestrian; and cyclist permeability through the development.

Consistency with the objectives of the maximum building height standard

Objective (a) - to establish the maximum height of buildings

The building height control which applies to the site (16m) is the standard building height contained in Appendix 12 of the Growth Centres SEPP.

The development when assessed in its entirety is generally consistent with the maximum building height. The portions of the building envelopes that are six storeys in height are limited to the internal elements of the building where the envelopes step in-line with the topography of the site. These portions are limited to minor slivers of the building envelope and lift overruns, which can be appropriately setback and treated to be visually recessive in subsequent detailed DAs. In effect, the ground floors at each building frontage need to overlap to provide access to lift cores and other internal circulation spaces, meaning that the middle sections of each building are six storeys. Designing a five storey building envelope with a finished floor level that steps repeatedly to follow the change in level would result in an inefficient design requiring numerous internal level changes that would create significant internal planning, access, servicing and structural issues. Because of the slope of the site, this arrangement is unavoidable.

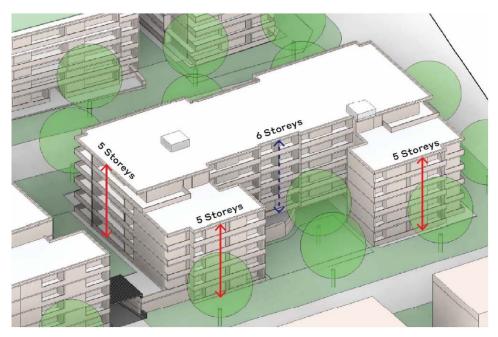


Figure 4 – Modelling of Building I demonstrating how the building presents as 5 storeys to each of the street frontages, with the sixth storey only interfacing with internal areas of the site Source: Kannfinch + Ethos Urban

A 16 metre height limit is generally accepted as being capable of accommodating a 5 storey building, with typical floor to floor heights of 3.1m and some allowance for overruns and roof features. Because the site is sloping, the building envelopes have been stepped across the site to respond to both the natural topography of the land and the new road levels. To maintain a strong built form presence to the public domain in manner the reflects the desired future character of the area, the Concept Proposal proposes a five storey form to the public domain. This results in elements of the building envelopes projecting through the 16m height plane. The highest point of any proposed building envelope above existing ground level is 20.67m on Building G. It is noted that this is the location of a considerable sag point in the existing ground level (refer to the survey at **Appendix C**). The highest point of any proposed envelope above the finished ground level is 19.7 metres on Building E.

Objective (b) - to minimise visual impact and protect the amenity of adjoining development and land in terms of solar access to buildings and open space

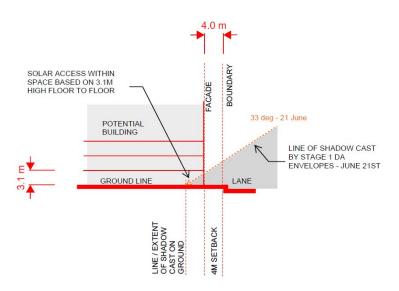
The proposed height will not have an overbearing impact on the adjacent development given its location adjoining Area 20, which is afforded a maximum height of 26 metres. The numeric height limit exceedance will have no significant impact on the streetscape, transition to the future built form or the perceived scale of the building when viewed from the public domain. The proposed envelopes, whilst exceeding the maximum building height development standard to accommodate the lift overruns and a small portion of the roof slab, will not impact on the sharing of views. Lower height buildings are proposed towards the northern part of the site, where buildings will be generally less than 16 metres high, to facilitate transition to the adjoining residential areas to the north.

The proposed building elements above the height limit will not obscure any sight lines and the values of view sharing are acknowledged in the design. The amenity and visual privacy of surrounding dwellings has been achieved through building separation distances and setbacks.

Where the development exceeds the maximum height limit it will have no additional impact on the solar access to the surrounding properties. The proposed development is appropriately setback from its boundaries and adjoining sites to ensure satisfactory levels of solar access will be maintained. The shadow diagrams and SEE demonstrate that the future development adjoining the Site will benefit from good amenity irrespective of the variation relating to the building height control. The additional height control will still allow solar access well above the minimum standards to be achieved for the residential properties and open space in accordance with the requirements of the Blacktown City Council Growth Centres Precincts DCP (BCC Growth Centres Precincts DCP) and ADG.

With particular emphasis on the presently vacant land to the south, Kannfinch have completed detailed analysis of the potential overshadowing of the proposed building envelopes on this land (refer to **Attachment A**). The following is noted in relation to the updated Shadow Study:

- The purple dotted line on the plans illustrates a <u>4m setback</u> from the proposed laneway on the adjoining land to the south. This setback is the minimum possible distance that residential development may be constructed on this southern site, in accordance with Section 4.3.5 of the BCC Growth Centres Precincts DCP. This section of the DCP states that shop top housing may be constructed 4m from the boundary on the first floor, whilst residential development on the ground floor would be required to be setback 4.5m from the boundary (ie: a further 0.5m from what the Shadow Study accounts for, as the worst case scenario).
- The Study illustrates that the shadow cast by the building envelopes on the 21 June (being the Winter Solstice) will partially breach the setback zone, however, the shadow will not extend beyond the ground floor of any potential building to the south during the 9am to 11am morning period. This is shown in the façade cross section taken at 11am (refer to Figure 5 below). Assuming that a 3.1m floor to ceiling height is adopted at ground floor, it can be seen that the shadow cast would not extend to the upper floors of the building.



PART SECTION THROUGH LANE

Figure 5 - Section showing the extent of overshadowing on the minimum façade line for potential future development to the south at 11am

Source: Kannfinch

This outcome is appropriate for the following reasons:

- The land to the south is zoned B4, which restricts the types of residential accommodation that can be developed on this site to shop top housing, seniors housing, and boarding houses. The ground floor of any future building would therefore be expected to accommodate primarily non-residential uses.
- The Study does not reflect the change in level between the site and the land to the south. The finished ground level of the site is lower than the ground level of the southern site. Therefore it is likely that actual solar access will be greater than that depicted within the Solar Study.
- The 3.1m floor to ceiling height used in the Solar Study does not account for the recommended 3.3m floor to ceiling height under the Apartment Design Guide for the ground floor and first floor of a building within a mixed use area, which would also be expected to improve the modelled solar access.
- The Precinct Plan for Area 20 designates the land to the south as being for the purposes of a commuter car park, and as such it is unlikely that intensive residential development will be constructed on this site in the near future.

In view of the above, the Solar Study has adopted a conservative approach and confirms that a minimum of 2 hours of solar access can be achieved by future residential development to the immediate south. The Concept Proposal will therefore not impact any future residential building's ability to comply with the design criteria under Objective 4A-1 of the Apartment Design Guide.

Objective (c) - to facilitate higher density development in and around commercial centres and major transport routes

The site is located within the R3 Medium Density Residential zone. The proposal will provide residential uses that are compatible with the housing needs of the future population, within 2-3 minutes walking distance of the future Cudgegong Road Metro Station and Town Centre. The proposal will provide a range of residential and non-residential uses comprising up to 630 apartments and two neighbourhood shops. The scale and density of the proposed development is appropriate to the location of the site in such close proximity to high frequency public transport, and planned shops and services in the adjacent neighbourhood centre.

The inconsistency of planning controls surrounding Cudgegong Road Station is particularly relevant in the case of this site, because other land that has the same characteristics and is a similar distance from the metro station and town centre, but is located in the Area 20 Precinct immediately adjacent, has a maximum building height standard of 26 metres. While the development application seeks to comply as closely as possible with the relevant standard of 16 metres, there is a sound argument that the site has capacity and is suitable for substantially taller buildings, particularly in the eastern parts of the site closer to the centre and metro station. In this context, the proposed minor exceedances of the maximum height of buildings standard are consistent with objective (c).

1.3.3 Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

In the decision of Wehbe, the Chief Justice expressed the view that there are five different ways in which an objection to a development standard might be shown as unreasonable or unnecessary and is therefore well founded. Of relevance in this instance is the first way, which is:

 the objectives of the standard are achieved notwithstanding noncompliance with the standard;

Objectives otherwise achieved

As detailed in the section above, the Concept Proposal satisfies the height of building objectives notwithstanding the proposed variation. The Concept Proposal, including the proposed elements that exceed the building height limits, will facilitate development that will continue to achieve the objectives of the standard. As the objectives of the development standard are met notwithstanding the breach, the first way is satisfied.

Having regard to the above, in our view it would be unreasonable and unnecessary to enforce strict compliance with the maximum height development standard contained within Clause 4.3 of the SEPP (Appendix 12).

1.3.4 There are sufficient environmental planning grounds to justify contravening the development standard

Clause 4.6(3)(b) of the SEPP (Sydney Regions Growth Centres) Appendix 12 requires the departure from the development standard to be justified by demonstrating:

that there are sufficient environmental planning grounds to justify contravening the development standard.

In Four2Five, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 variation request must be particular to the circumstances of the proposed development on that site. There are sufficient environmental planning grounds to justify contravention of the building height development standard in this specific instance. The particular circumstances that justify the proposed variation to the building height standard are detailed below.

- The natural ground level falls by approximately 13 metres from south east to north west, and towards Tallawong Road. As the proposed building envelopes are rectangular, they do not correspond neatly with natural changes in topography, resulting in portions of the roof slab and lift overruns projecting above the maximum height limit. While the proposed design steps to respond to the gradient, it is not possible to contain all elements of the building under the 16 metre height plane.
- Designing a five storey building with a finished floor level that steps repeatedly to follow the change in level would result in an inefficient design that would require numerous internal level changes that would create significant internal planning, access, servicing and structural issues.
- The Riverstone East precinct is undergoing a transition to a medium density urban form, to reflect its proximity to the Cudgegong Road Metro Station. The significantly enhanced public transport access when the Sydney Metro Northwest opens in 2019 will provide a catalyst for new growth and development, in increased densities as set out in the Precinct Plan. The proposed scheme seeks to redevelop the site in accordance with the vision of the area and envisages a scale of development consistent with the proposal. As such, the proposed variations to the height limit will not result in a departure from the vision.
- Under the BCC Growth Centres Precincts DCP the site is shown as medium-high density residential, sits within 200m of the future metro station and is adjacent to Area 20 which is afforded a maximum height limit of 26 metres. As such, it is considered that it is suitable to

achieve higher densities here than in other parts of the zone. The proposed development will deliver a built form outcome that is neutral or beneficial in its built form relationship with both the public domain and adjoining properties, and will not give rise to any significant environmental impacts notwithstanding the variation from the building height development standard.

If the site was not impacted by significant changes in ground level the Concept Proposal building envelopes would generally sit within the 16m height limit.

Given the proposal will not result in any adverse impacts to surrounding residents, is generally consistent with the envisaged built form of the locality, and will provide a higher standard of amenity to residents, the proposal is considered to have sufficient planning grounds to justifying contravening the maximum building height development standard. There are clear and justifiable environmental planning merits which justify the flexible application of the height control allowed by clause 4.6.

1.4 Other Matters for Consideration

Clause 4.6(5) of the SEPP (Sydney Regions Growth Centres) Appendix 12 requires the following additional matters to be considered.

1.4.1 Whether contravention of the development standard raises any matter of significance for State or regional environmental planning

The proposed Concept Proposal seeks to amend the maximum building height development standard under Clause 4.6 of Appendix 12 of the Growth Centres SEPP. This variance relates primarily to the topography of the land and will contribute to the delivery of new housing in the North West Priority Growth Area.

In accordance with the draft West Central District Plan, the proposal will deliver diverse housing typologies to meet the needs of changing communities and is ideally situated to provide new housing stock which will benefit from the construction of the new metro station. The site is proximate to planned public open space, essential services and facilities that will service the residents and assist with the '30-minute city concept'. The site's size, locational characteristics and the proposed use make it a prime example of a site that is well situated to meet the objectives of the draft Plan. As such, the additional height proposed does not result in any adverse impacts on the surrounding area, and enables a more appropriate distribution of building mass across the site.

Beyond this positive contribution, the proposed variations will not have any adverse effects outside of the sites immediate area.

1.4.2 The public benefit of maintaining the development standard

Maintaining the development standard would not result in any public benefit in this situation. As demonstrated above, the proposed height of building envelopes reflects the topography of the land and will only affect portions of the Site.

It is not considered that there would be any public benefit in maintaining strict compliance with the development standard, particularly as the key planning issues related to the building height such as privacy and overshadowing, have been resolved through building separations and setbacks.

1.4.3 Any other matters required to be taken into consideration by the Director-General before granting concurrence.

The proposed variation to the building height development standard will facilitate the orderly and economic redevelopment of a large underutilised site zoned for medium density development within walking distance of the future Cudgegong Road Metro Station. The proposed development will therefore assist in achieving the earmarked dwelling targets in the North West Priority Growth Area, and thereby the strategic objectives of A Plan for Growing Sydney and the draft West Central District Plan.

1.5 Summary

Clause 4.3 of the Appendix 12 of the Growth Centres SEPP is a development standard, and applies a maximum building height limit to the site. The development proposes to exceed this limit by up to a maximum of 4.67 metres from existing ground level and by 3.7 metres from the finished ground level. The proposed exceedances are generally a result of accommodating the slope of the land. This request under Clause 4.6 is submitted to Council in support of this departure from the height standard.

Consistent with the aim of Clause 4.6 to provide an appropriate degree of flexibility in certain circumstances to achieve better outcomes for and from development, a departure from the building height standard is considered appropriate in these circumstances as:

- non-compliance with the building height development standard does not represent a significant variation in the context of the overall built form and would not be perceivable from the public domain or existing and future surrounding development;
- the proposed buildings will be up to 10 metres lower than buildings permissible on adjoining land to the east and south where there is a 26-metre height limit, and will therefore not be out of context with surrounding development;
- there are sufficient environmental planning grounds to justify the contraventions to the development standard as the building provides an appropriate response to its specific site context and will maintain the level of the amenity for surrounding and future residents; and
- there is no public benefit in maintaining the building height development standard adopted by the environmental planning instrument for this site.

Attachment A – Updated Solar Study

Kannfinch



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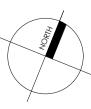
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	NOT SCALE from this drawing. Use given dimens					
Cheo	ck all dimensions on the job prior to commence	ement o	of shop			
drawings or fabrication. Any discrepancies are to be referred to the			ed to the			
Arch	Architect/Engineer/Designer prior to commencement of work					